United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL
WITH PROOF
OF SERVICE

76-1335

To be argued by
IRVING ANOLIK

B
P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

MICHAEL DEMICHAELS, PETER VARIANO, LAWRENCE CENTORE, JOHN MONACO, MICHAEL PICCIANO, MICHAEL EVANGELISTA, ANTHONY RUSSELLO, and HENRY BUCCI,

Defendants-Appellants.

JAMES OSTRANDER, ALFONSO COLETTI, MICHAEL YANNICELLI, WILLIAM MURTY, and FRANK GALLELLA,

Defendants.

DEFENDANT-APPELLANT VARIANO'S BRIEF

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In the
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UNITED STATES OF AMERICA,

Appellee,

-against-

MICHAEL DEMICHAELS, PETER VARIANO,
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Defendants-Appellants,

JAMES OSTRANDER, ALFONSO COLETTI,
MICHAEL YANNICELLI, WILLIAM MURTY,
and FRANK GALLELLA,

Defendants.

DEFENDANT-APPELLANT VARIANO'S BRIEF

STATEMENT

Defendant-appellant VARIANO appeals from a judgment of the United States District Court for the Southern District

of New York, rendered the 8th day of July, 1976, convicting him of a violation of Title 18 U.S.C. §1955, after trial before Carter, J., and a jury.

The appellant, VARIANO, along with a number of other co-defendants, had also been indicted for conspiracy to violate 18 U.S.C. §1955 (organized crime - gambling). The Trial Judge, however, dismissed this count prior to the summations of counsel.

VARIANO was sentenced to 3 years imprisonment and a fine. He is presently at liberty pending the determination of this appeal.

INTRODUCTORY

There were several serious errors made in the case at bar, the most egregious of which is unquestionably the fact that the Trial Court dismissed the conspiracy count, but not the substantive count, following the conclusion of the presentation of evidence.

The appellant, VARIANO, submits that since Section 1955 of Title 18 requires the joint action or the "conspiratorial action" of at least five persons, that it was completely inconsistent and incredible that the Court should permit the so-called

"substantive" crime to be submitted to the jury.

In essence, Judge Carter made a "Chinese jigsaw puzzle" of this entire case. During the course of the presentation of evidence, as this Court will unquestionably observe from the record, a good deal of testimony was produced of a hearsay nature, which could only be adduced by virtue of the fact that a conspiracy was alleged in the indictment. The so-called "darling" of the prosecutor's nursery, i.e. conspiracy, was the vehicle by which the prosecution sought to establish that the crime had been committed.

During the course of trial, time and again the Court made it quite clear that evidence was being received subject to connection.

There were no fine lines of demarkation, however, as to what that really meant.

When the case was finally submitted to the jury, it was obvious that it would take a computer of some degree of sophistication to comprehend what evidence could be considered by the veniremen, and what could not. To expect laymen to make the determination of which could or could not be considered in their deliberations on the so-called substantive count, was far and above what anyone could expect, not only from laymen, but

from attorneys as well.

The observation of Judge Hand and other courts, that jurors could not perform such "mental gymnastics", becomes painfully obvious in the case at bar.

If this had been a trial of just two or three, or even four days, conceivably we might expect a jury to have recollected the evidence and understood what was or was not conspiratorial conduct. This case, however, took about ten trial days and to expect jurors to have kept in mind all of the instances of conduct that was conspiratorial and conduct that was not, is far too much to expect from any human being.

In addition, however, we maintain that the record is insufficient as a matter of law to have established a violation of Section 1955 of Title 18 of the United States Code. VARIANO was not shown to have been associated with five or more persons in the prohibited conduct.

In any event, because of the confusion over the dismissal of the conspiracy count, it would have been virtually impossible to sift out what evidence went to the proof of the violation of the substantive charge and what evidence had to be rejected as a result of so-called co-conspiratorial conduct.

So far as VARIANO is concerned, the only evidence

against him was adduced by Mrs. David, and perhaps through an alleged voice identification, which we maintain was of questionable value, by Agent Douglas A. Wilhelmi. To make matters worse, the voice identification hearing was held in the presence of the jury.

An apparently essential witness, one of the co-defendants in the case, Francis Millow, whom the Government called as a witness, declined to testify despite threats of contempt, and was ultimately actually held in contempt.

Some of these proceedings occurred before the jury itself, and we maintain that this was highly prejudicial to the conduct of the trial.

THE EVIDENCE

The chief witness for the Government was MICHAEL CALISE, who, in addition to his job as a truck driver, started picking up numbers that his father had been picking up before he died (370-71).

He commenced his activities in September of 1968 and would pick up wagers in various establishments in Yonkers (373). He'd usually start at 10:30 A.M. and would be through at 1:30

P.M., working a six-day week.

According to Calise, he would turn his numbers over to the person who would run the bank and at that time it was his uncle, Joseph Calise (374).

Calise explained that about 30 to 40 people were betting with him and his handle was approximately $700.00 to $1,000.00 per week (376).

Calise stated that he met Defendant Centore ("Black") at Bruno's Restaurant around September or October of 1968 (377). When Centore asked him if he were picking up numbers at Bruno's, he replied "no." Centore then warned him that he did not want him to pick up numbers there because they did not want him to take any action out of the place and also because they were paying off the police (378). Calise explained that Danny Marciano was also picking up numbers there (378). However, Nancy, the waitress, and Tony Bruno would tell the people at the restaurant to give him the action instead of Danny (378-79).

Thereafter, Centore told the witness that he could pick up numbers at Bruno's only if he gave Mike Yannecelli the action. Upon agreeing to this, Calise made arrangements with Yannicelli to give him the work (382). He was instructed to leave his policy plays in an envelope at one of the other

runner's places of business before 1:30 p.m. each day. The designated place at this particular time was Jimmy Conte's on Elm Street (383).

Besides picking up the number wagers, Calise also picked up horse wagers. Yannecelli gave him two telephone numbers to call in his horse bets. Calise claimed that Centore was present at this time (383-84).

Calise further testified that he worked as a runner for Yannecelli and Centore for approximately four months (387). Since he was gambling heavily, he wanted extra income and went to talk to Centore to see if Yannecelli would give him a job in the organization. This occurred in March or April of 1969 (388). Although Centore represented that he would speak to Yannecelli about it, nothing happened. About a month later, Calise had still another conversation with Centore wherein Centore told him that he would work for Adams instead of Yannecelli (391). It was then arranged that Adams would give him a job picking up some accounts plus a piece of the action. Calise then started to pick up policy from six different accounts (392). He would give the envelope containing the horse bets to a man named Alex, and would give the number bets to Adams. He estimated that approximately $5,000 to $7,000 in wagers were placed

with Adams (395).

Calise continued to work for Adams for six to seven months. However, Adams got sick and had to give up the business. Consequently, he started working again for Yannecelli as a pickup man and continued to work for him until August of 1971 (396-98). His connections centered primarily in the Yonkers area, but they also had accounts in Hasting, Eastchester, and Tuckahoe. His compensation for this work amounted to $150 per week (399).

Based on his daily activities for that one and a half year period, Calise maintained that he was familiar with the codes which represented runners in Yannecelli's operation (399). Among these code numbers, he designated Appellant DeMichaels' number as 19. He stated that DeMichaels was situated at the Green Tavern in Hastings, and had about 10 to 12 runners of his own (402-04). Co-appellant dealt with both horse and policy numbers (404). According to Calise, Mike Millow was one of DeMichaels' coded runners, "17." Millow had a soda shop on Lake Avenue in Hastings (406).

During this period, in August of 1971, Calise had a conversation with Centore regarding the money he owed the operation (414). Calise recounted that he had collected some money

from a few accounts and then lost it at the racetrack. Centore came to Bruno's very early in the morning and called him outside. He than smacked the witness in the face and told him if he ever "screwed around with any of his money again he's break my legs." (415) He gave Calise until the next day to come up with the money he owed (415). Calise borrowed the money from Nancy and Tony Bruno, and the next morning gave it to William Murty (416). He believed that Murty gave the money to Yannecelli (416). Because he was getting into trouble by gambling too much, he told Murty in August of 1971 that he was quiting the organization (417). For three to four months, Calise tried working at a regular job, but then asked Yannecelli if he could return to the organization (418). A few weeks later, he became a phone man in the horse officer and would take bets there. The witness stated that generally two men would work the phones, the bettors would call and give their code names, and then place their bets (421). The men would write these bets down on dissolvable paper in case the police should come through the door (422). The accumulated wagers for the day were wrapped in an envelope and marked "horse office." These envelopes would then be left in a mailbox for the night pickup men. In order to avoid apprehension by the police, they would change the

location of the horse office every two weeks (422-23). During this particular period, all the horse offices were located in Westchester County, but the office was moved to the Bronx. It was their practice to rent apartments from people in the Bronx and pay them about $150 per week for the use of their telephone. Calise maintained that his activities in the horse office continued into the middle of July of 1972 (424). He then started to help Jimmy Hopper total the results from the racetrack which would require him to work six days a week. In March of 1972, Defendant Murty checked all the number work. Murty would also meet all the pickup men and get the work from them to ascertain that everything was in order (424). The results of their calculations were placed on tapes which were delivered to each account on Sunday morning (427). Yannicelli would always receive a copy of this tape (428).

In August of 1972, Calise stated that they had to close down their operation for two weeks because the Feds were in town. When they reopened, Yannicelli wanted to hire all new faces to change the operation (430). Yannicelli then ordered him to hire all new pickup men. Although new men were hired to fulfill this function, Calise asserted that the accounts remained the same.

When Jimmy Hopper died in June of 1972, Yannicelli directed him to continue to run the horse office and directed Murty to continue to do the number work. Calise stated that he was doing all the paying and collecting. If there were a hit, he would have to pay the runners (432). During this period, it was necessary for him to see Yannicelli every day to discuss the business (433). He would occasionally see Centore and once had a conversation with him wherein Centore asked if he had seen Yannicelli. Centore then asked him if he had any money and Calise gave him $130 (433). When Yannicelli learned of this he got very angry and warned Calise that it was up to him to take care of these things (434).

Calise then related the events which led to the termination of his employment with the organization on August 27, 1972 (435, 490). When Hopper died, Calise was doing all the paying and collecting for the organization. Unfortunately, he still had a problem with gambling. He used the money he collected to place his own bets and between the second week of July to August 27th, he lost $16,000 at the track (435). There finally came a point when he did not have enough money to pay the hits. Calise stated that he had to collect $1,700 from appellant's account and usually it was collected on Thursdays

(435-36). Pursuant to his request, appellant gave him the money on Wednesday (436-37).

Calise then went on to claim that he knew the Defendant Variano. In the beginning of 1971, Calise would take to Variano and Yannicelli at the Chema Lounge (437-38). Variano only mentioned that when he got back, things were going to change a little - things were going to be good (439).

Calise maintained that Yannicelli had been his boss. Although he asserted that all slips bearing the code numbers belonged to DeMichaels' account, the witness did not remember ever personally picking up policy numbers from him (518).*

ANGELINA DAVID testified that she has known Defendant Variano for 24 years and during this time she was both his girlfriend and business acquaintance. In the beginning of 1973, Variano asked her to do his football pools for him commencing September 1st. She did not want to do it but as usual agreed

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*William McKenna, Assistant District Attorney of Westchester County, called as a witness in behalf of Defendant Centore, testified that Calise had been indicted for the crimes of promoting gambling in the first degree and possession of gambling records in the first degree. These crimes carried a maximum of four years. Thereafter, Calise jumped bail and a bench warrant was issued on December 11, 1973. Bail jumping was a felony in New York punishable by a maximum of four years. When Calise was finally apprehended, he would not cooperate with the federal government until he had some assurance regarding the state matters. He thereafter was permitted to plead guilty to a misdemeanor and received a suspended sentence (1090-1103).

to help him (635). Accordingly, she figured the football scores until the third week in December (637). She identified Bucci as Variano's partner, and alleged that together they had 20 to 25 accounts. Because Variano was such a perfectionist, he and Bucci continually argued (641-42). She therefore told Variano that Bucci could not come to the apartment anymore because of all the bickering (641). Miss David stated that both Pop Millow and Bucci had an account (642). At one point, according to this witness, Variano had to pay off under two point systems and therefore had to borrow the money to make the payoffs. Not only did she loan him some money, but also he had to borrow it from other people around town. This took place during the second week of December.

David claimed that in July of 1973, Variano had told her that he was in sports, policy and horses (647). On occasion, she would go with him when he would collect the money from the bets and actually saw money exchanged (647). However, she never overheard any conversation with anyone with whom he was exchanging money (650). The last time she saw Variano was two days before Christmas of 1973 (650). This witness concluded her testimony by characterizing Variano as a "bum" and further stated that "I don't hate him, but he used me and I just resented

him." (653)

THERESA BELARDO testified that she had resided at 929 East 213th Street in the Bronx for 47 years and had the same phone number for the past 20 years. She met Michael Evangelista in the spring of 1974. He asked her if she would like to earn some money for the use of her phone for incoming calls (718). After giving her permission, Evangelista used her phone for three weeks (720). He would generally arrive at 10:30 a.m. and leave at 1:30 p.m. In the evenings, he would arrive at 6:00 p.m. and leave at 8:00 p.m. (719-20). She personally observed him using the phone and writing down information. The telephone would ring approximately once every two minutes (721). After this three-week period, Evangelista disappeared (722). He again appeared at the end of November or the beginning of December of 1975. He would then use the phone in the same manner as he did previously. On New Year's eve, F.B.I. agents arrested him in her apartment (724).

SPECIAL AGENT RAYMOND J. TALLIA testified that on July 16, 1975 in the Red Coach Grill in Yonkers, he overheard parts of Variano's conversation with another man (1232-34). There were comments made about a $50 bettor, sports and a reference to "Larry." (1230) Centore then joined the two men.

On February 10, 1976, while in the library of the Strike Force of the Southern District of New York, he overheard a remark by Centore. Present at this time were Variano, Russillo, Picciano, DeMichaels, Monaco, Galella, Bucci and Evangelista. Centore read the indictment and commented to Yannicelli, "I don't recognize some of your partners, Mike." (1218) Yannicelli put his hands in front of his face and warned him "Don't say anything." (1219)

SEIZURES OF EVIDENCE

Law enforcement officials seized the following evidence from respective defendants and co-conspirators which was introduced into evidence:

On October 9, 1970, Joseph DiSciori, Criminal Investigator with Westchester County's District Attorney's office, executed a search warrant at Apartment 3-G, 82 Given Street, Yonkers, New York (340). Numerous envelopes containing slips of paper on which were written mutuel horserace policies were seized, along with other pari-mutuel slips, which were found in a brown suitcase. Yannicelli was the sole occupant of the apartment (340-42).

On September 3, 1974, James Trotta and Detective

William Drain, members of the Yonkers Police Department, arrested Defendant Monaco who at that time was driging a brown 1972 Ford (354-55). Monaco was stopped because they knew he was operating a vehicle without a driver's license (356-57). While Officer Trotta was taking this vehicle to the police pound, three white envelopes fell from the sunvisor into his lap (357). He recognized that the envelopes contained gambling records. Monaco was then placed under arrest for possession of gambling records. Thereafter, at the police station, a search of Monaco's person revealed four more white envelopes containing gambling records (357-58).

On November 23, 1974, Carmine DiFalco executed a search warrant at the Headless Horsemen Center at Beckman Avenue in North Tarrytown (622). Gambling paraphernalia was found.* According to DiFalco, Defendant Bucci was one of the persons who was present at this location (624).

On December 27, 1974, Robert C. Reutter, Special Agent with the F.B.I., executed a search warrant at Gunhill Boston Post

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*This envelope consisted of lists of football games with lines (Gov.Exh. 29), football slips (Gov.Exh. 27), and records of wagers and accounting records. These football wagers and accounts represented games played during the months of October 1974 through December 1974 (853-59). Counsel for Bucci conceded that his client's fingerprints were on Gov's. Exh. 29 (935). The Government urged that said evidence was part of the Variano operation (834-35).

Road (349) Defendant Picciano, who was driving a brown Corvair, was arrested at that intersection His car was then searched and a package was found in a brown paper sac which contained policy slips (351-52, 860). On this same date, Harold Kain, Jr., Investigator for the Westchester County District Attorney's staff, executed a search warrant in which the Defendant Murty was named as the designated target. Murty was observed parking a car on Gunhill Road in the Bronx. After Murty was shown the search warrant, he said the work was under the front seat of his car. An envelope was then removed which was found to contain numerous policy slips (828).

On December 31, 1974, three separate searches were conducted. First, Detective Sergeant Richard Spota participated in the execution of a search warrant at 25 Cedar Street in North Tarrytown. Anthony and Francis Millow were specifically named in the warrant. Various gambling paraphernalia was found such as two racing forms, a cigar box containing policy slips, a black book containing digit numbers, and a calendar with three digit numbers set forth on each date on the calendar. During the search, Defendant Bucci came to the door and told the Agents that he was looking for fish that was in the refrigerator (584). Second, Gregory Albanes executed a search warrant

at 929 East 213th Street in the Bronx. When they entered the apartment, Evangelista went into the bathroom and tried to wash the paper in the sink, since it was rice paper and water soluble (812-13). However, he was prevented from destroying the paper, and the officers were able to recover the slips of paper that were left (813). And third, Frank Santarsola, Criminal Investigator with the District Attorney's office in Westchester County, entered Apartment 1 at 211 Third Avenue in Pelham, New York pursuant to a search warrant. Defendant Russillo was in the apartment when the officers found gambling records for football and basketball games in a small bedroom off the master bedroom (818, 865-68).

Thereafter, on September 2, 1975, William Skelton, Criminal Investigator with the Westchester County Sheriff's office, executed a search warrant at the intersection of Park Avenue and Ashbury Avenue in Yonkers (361). An individual named Peduto and several vehicles were designate as targets in the warrant. Policy slips were found in several of the cars and two small brown paper bags were seized (361-62).

Finally, on November 12, 1975, another search warrant was executed for two individuals designated as John Does who were later identified as Benedetto Conte and Defendant Picciano

(364). Envelopes containing policy were found on Conte's person (366).

SURVEILLANCES

Detailed evidence encompassing the surveillance by various Government officials of many of the defendants and co-conspirators was also elicited from Government witnesses.

On March 1, 1974 and March 19, 1974, Agent Wilhelmi observed Joseph Millow enter the Green Tavern in the town of Hasting on the Hudson, where he remained for only three minutes (702). On April 9, 1974, this same Agent observed DeMichaels leaving the Green Tavern at 1:48 p.m. At approximately 1:50 p.m., Joseph Millow was sitting in a parked car across the street when another male approached him, handed him something, and talked with Millow for a short while (710). On this same date at 1:55 p.m., Special Agent Carl Amaditz observed Variano standing in the window of the Green Tavern. He then saw Yannicelli enter this establishment and ten minutes later, the two men left together. Three minutes later, Joseph Millow also left the tavern (745).

On April 15, 1974 at about 1:09 p.m., Agent Wilhelmi observed DeMichaels looking out the window from inside the Green

Tavern. He exited the restaurant at 1:17 p.m., talked to a man in a Chrysler, and went back into the restaurant. DeMichaels again left the Tavern and was observed carrying a paper bag. He went into 10 Main Street. At 1:30 p.m., Joseph Millow went into the Green Tavern and remained there for two minutes (707-08).

On April 18, 1974, Special Agent McMurty observed Yannicelli leave the Green Tavern at 1:00 p.m. He then observed Yannicelli and Variano talking with "Top" Millow in the Municipal Parking Lot across the street (739-40). On this same date, Special Agent Clark observed Millow stop at a traffic light on Main Street, which was in the vicinity of the Green Tavern. A car driven by Yannicelli with Variano as a passenger stopped at the intersection. When both vehicles pulled over, Millow got out of the car and leaned into the passenger side window of Yannicelli's car (742).

Agent Wilhelmi, on November 18, 1974, observed Anthony Russillo and an unknown male get into a white Buick parked at 211 Third Avenue in North Pelham. At 1:44 p.m., Joseph Millow arrived at the same address, reached into the mailbox, and entered the residence. At 1:49 p.m., he picked up a newspaper that the mailman had left, again reached into the mailbox and went

back into the house. He then left the building (710-11).

On December 10, 1974, Special Agent Reutter followed Evangelista to the area of 239th Street and Bronx Boulevard, where he walked to a vehicle which the Defendant Murty was driving. Defendant Picciano was standing by the car window (750). The Agent thereafter observed Picciano driving a brown Corvair in which Evangelista and Defendant Ostrander were passengers (750). In the meantime, Agent Wilhelmi was in the vicinity of 949 East 214th Street in the Bronx. At 1:13 p.m., he observed Evangelista walking down the driveway of that address and getting into a cab. Two days later, he also observed Evangelista leaving this address. He then observed Picciano get into a parked car in that vicinity and drive away (777).

On December 13, 1974, in another surveillance of 239th Street and Bronx Boulevard, Agent Reutter observed Murty and Evangelista in their respective cars. They stopped and spoke to each other. After they left the area, Agent Reutter observed Defendant Monaco driving a white Buick in which Evangelista was a passenger. The two men met Defendant Picciano in the center of the street (754).

On December 18, 1974, Agent Reutter conducted a

surveillance of East 216th Street in the Bronx. At about 1:00 p.m., Defendant Murty arrived and parked his car. Evangelista parked behind him a few minutes later and handed Murty a brown paper bag. At 1:43 p.m., he saw Murty driving his car, followed by Defendant Ostrander (756-58).

ELECTRONICALLY INTERCEPTED CONVERSATIONS

Finally, the Government, in order to prove their case, relied on numerous electronically intercepted conversations, all of which concerned various defendants either arranging bets or talking about the bamgling business. It should be noted that appellant was not a party to these conversations, nor was his name ever mentioned in any one of these conversations.

Defendant Variano was party to two conversations.* On November 14, 1973, Variano asked Joe "How's the football? Good huh?" Joe in turn responded, "Yeah, makin' a few dollars." Variano concluded the conversation by stating, "Now if you have any problems, don't forget to leave word in the office."

*Agent Wilhelmi claimed he recognized Variano's voice on these tapes since he heard his voice again on February 10, 1976 for about three to four minutes (1140). Additionally, the Agent heard his voice on February 10, 1974 while he escorted Variano to the New York office (1140-45).

Thereafter on November 23, 1974, another conversation ensued between the two men. When Variano asked what happened to the bank, Joe informed him that they got picked up in the store before twelve o'clock by the "locals." Joe opined "That's what happens when you don't pay people." The two men then made arrangements to meet at the Green Tavern in 15 minutes.*

It was the Government's stated intention to connect all the reputed gambling activities of the defendants and co-conspirators through the testimony of Francis Millow. However, Millow refused to testify and was held in contempt by the court.

At the conclusion of the Government's case (1237), all counsel argued for a dismissal of the conspiracy count on the ground that the Government had proved multiple conspiracies instead of the single conspiracy charged in the indictment. The court agreed with counsels' arguments and dismissed the conspiracy count, setting forth its reasons as follows:

> "I have concluded that the conspiracy count must be dismissed as to all the defendants, because there is a variance between the government's theory of the case and its proof.
>
> "Let me briefly indicate my reasons. There are at least two time frames, and probably three, that

*Wilhelm stated that as a result of this conversation, they instituted a surveillance at the Green Tavern where they observed Variano and Millow meet in the parking lot across the street (1139).

have been set forth in this record, and they are separate and distinct. The first is from 1968 to 1972 involving Centore and DeMichaels as far as the defendants in this case are concerned.

"The second is in 1973 involving Variano and Bucci. I suppose we can merge that with the 1974 time frame because Mrs. David was talking about football bets, and obviously football bets occur in the fall and in the winter. So that under that we can reduce the time frame to two. And that time frame involves Variano and Bucci linked to football betting in 1974, as is Coletti and Russillo. And Picciano, Ostrander and Monaco are linked to numbers in 1974.

"Now it is true that this trial was not as extensive as Bertolotti on which I rely for the position I am taking, but I think that the principle which is applied in that case has to govern disposition of the case here.

"As I understand it, the principle is that in a multi-defendant trial where one defendant is required to sit through lengthy testimony which in no way involves him, that this is prejudicial and damaging.

"Let me just give you a few examples. As I recall the testimony, Centore's name was mentioned at the beginning, and DeMichaels, and they hadn't been heard of since in terms of the conspiracy.

"Mr. Coletti, I had forgotten that he was even on trial until yesterday when suddenly his name was mentioned in some wiretap conversations. One segment of the proof involved the three, apparently younger defendants, Picciano, Ostrander, Monaco, but they have not been linked to the others, and another concerned Russillo, Variano and Bucci. But nowhere are they linked to these other people in terms of time frame.

"Under those circumstances it is clear to me that Centore, DeMichaels, Coletti, Picciano, Ostrander and Monaco were prejudiced by the variance, and as to them I am clear that the count must be dismissed.

"I am certain that Russillo was prejudiced as well. While I do have some doubts that Variano and Bucci were prejudiced in the sense that I am talking of, since there was a great deal more testimony over

a longer time span involving them, I resolved the doubt in their favor and we will dismiss the count as to them.

"Now, the substantive count I reach an entirely different conclusion on. I think that there is sufficient testimony from Calise to send to the jury as to Centore and DeMichaels, the question of their violation of Count 2. While Mr. Panzer indicated that the evidence seized related to 1970, which may be true, my recollection is that Calise testified that the operation continued until he left in August of 1971, and that it involved a large number of people and money. And I think that under the circumstances that as to those two, a prima facie case has been made to come within the statutory requirements.

"As to Variano, Coletti, Bucci and Russillo, the evidence links all of them to Millow, and to each other. Thus, I have decided to send the case, as far as they are concerned on the substantive count, to the jury.

"Picciano, Ostrander and Monaco are linked together and to Evangelista and Murty and, therefore, I am sending the case involving them on the substantive count to the jury.

"While I realize that there is a danger here that either Mr. Mitchell or Mr. Panzer pointed out with the conspiracy count being dismissed of a spillover of fact as regards the hearsay testimony, I think that that problem need not be overemphasized in this case. The jury has been carefully instructed throughout the trial that the testimony coming in should be used only against the person who participated, and they will also be so instructed at the close of the trial in terms of their consideration of the evidence.

"Get the jury in, please."

Counsel thereafter argued that because of the conspiracy dismissal, the court should likewise dismiss the substantive count. Counsel asserted that first, since the elements of the conspiracy charge and the substantive charge were similar,

the Government was collaterally estopped from proving the latter. And second, counsel contended that the jury could not objectively determine the defendants' culpability on the substantive counts because of the prejudicial spill-over of the voluminous amount of evidence emanating from the multiple conspiracies. Although the court denied counsels' motions, it did acknowledge that it had difficulty with counsels' last contention which, in the opinion of the court, should be resolved by the Court of Appeals (min. of 7/8/76, pp. 27-28).

POINT I

SINCE THE TRIAL COURT DISMISSED THE CONSPIRACY COUNT, IT WAS ERROR TO PERMIT THE SO-CALLED "SUBSTANTIVE" COUNT [18 U.S.C. §1955] TO BE SUBMITTED TO THE JURY, BECAUSE IT, TOO, NECESSARILY PRESUPPOSES CONSPIRATORIAL CONDUCT BY AT LEAST FIVE PERSONS.

Judge Carter, in the Court below, must have had a feeling of "deja vu" after presiding over the trial of the case at bar.

Just a short time before this case went to the veniremen, this Court had reversed Judge Carter in UNITED STATES v. BERTOLOTTI, 529 F.2d 149 (2 Cir., 1975), on the grounds that that there had been multiple rather than a single conspiracy established by the proof.

In the instant matter, Judge Carter, desirous of not again suffering a similar fate at the hands of this Tribunal, dismissed Count One of this two-count indictment, namely that charging conspiracy, on the grounds that more than one conspiracy had apparently been established.

He was, however, reluctant to grant the motion with respect to Count Two because of its denomination as a "substantive" count.

In this respect, we submit that Judge Carter again fell into error since the peculiarities of the Second Count of the indictment, namely a charge under 18 U.S.C. §1955, necessarily presupposes conspiratorial conduct by at least five persons.

The jury, consequently, although told the conspiracy was stricken from the case, was nevertheless given a conspiracy to consider.

Judge Carter had already ruled that no single conspiracy had been established. If that was the case, how could the jury consider a single conspiracy under the substantive count? There is nothing in the charge whatsoever to guide the jury in determining which five persons they can consider with respect to the substantive count. Moreover, there is a different

time period within which the substantive count must be established. (The "conspiracy" started 9/1/68, but Count II allegedly commenced 4/15/71).

Throughout the trial there were rulings from time to time that certain evidence was being taken, binding upon certain individuals or subject to connection. This is typical, of course, in a conspiracy case because hearsay is admissible when one co-conspirator utters a statement in furtherance of the conspiracy or performs an act in that regard during the course of the conspiracy itself. Once the conspiracy count, however, was dismissed, the jury could no longer consider any of these hearsay statements and could no longer consider any acts of one alleged co-conspirator as binding on any other.

In this rather lengthy trial, we submit that it was an exercise in futility to expect the jurors, all laymen, to perform the mental gymnastics that were necessary to try to determine what evidence could or could not be used.

The only fair thing that could be done by Judge Carter would have been to dismiss the indictment entirely.

Not unmindful of the serious questions involved, at page 28 of the sentence minutes Judge Carter declared:

"I think that those issues have merit and I may take

> a pointed view about them, but I think that those issues are meritorious issues for the Court of Appeals to consider."

Judge Carter, at page 1293 of the record, citing BERTOLOTTI, supra, specifically declared that that case motivated him to the action which he took in dismissing the conspiracy count.

Having gone that far, however, it is obvious that Judge Carter should have dismissed Count Two as well, since unlike the ordinary substantive count, this was framed in such a way as to require the conjoining of five or more persons in order to commit the transgression.

In UNITED STATES v. BERTOLOTTI, 529 F.2d at 155, this Court explained that the coincidence of certain common factors running through several disjointed conspiracies does not suffice under the KOTTEAKOS rule (KOTTEAKOS v. UNITED STATES, 328 U.S. 750, 773-774). This Court explained, id.:

> "Indeed, the only common factor linking the transactions was the presence of Rossi and Coraluzzo. This type of a nexus has never been held to be sufficient. Kotteakos v. United States, . . ."

What Judge Carter accomplished by his dismissal of the conspiracy count was completely nullified by his permitting the second count to go to the jury.

If, for example, an indictment charged a conspiracy

to assault a federal officer and also charged the actual assault of that officer, the Trial Court might very well let the substantive count go to the jury, even though it dismissed the conspiracy count. The reason for that is that each individual on trial could be separately convicted of the assault despite the fact that there was no conspiratorial conduct.*

In the case at bar, however, under the unusual language of 18 U.S.C. §1955, no single individual could commit the crime. At least five people acting together have to commit the crime under the circumstances set forth in the statute, otherwise no crime at all is committed.

Judge Carter created a "Chinese jigsaw puzzle" when he ruled that the conspiracy count had to be dismissed.

All of the prior rulings throughout the trial, which involved the very intricate questions of conspiratorial and non-conspiratorial conduct, could not be segregated in the minds of any lay jury We submit that it would be a physical and mental impossibility to perform the mental gymnastics necessary to recall what evidence was or was not admissible on the conspiracy and against whom it might have been used.

Under the circumstances of this case, the dismissal of the conspiracy count necessarily brought with it an

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*The dilemma of redacting the conspiracy testimony would remain, of course.

irreconcilable dilemma with respect to the substantive count because it, too, depends upon conspiratorial conduct.

The same logic is applicable in this case, as was applicable in UNITED STATES v. ZEULI, 137 F.2d 845 (2 Cir., 1943); UNITED STATES v. SAGER, 49 F.2d 725 (2 Cir., 1931); and UNITED STATES v. CENTRAL VEAL AND BEEF COMPANY, 162 F.2d 766 (2 Cir., 1947), although converse. See also, GEBARDI v. UNITED STATES, 287 U.S. 112 (1932); UNITED STATES v. KATZ, 271 U.S. 354 (1926); and UNITED STATES v. HOLTE, 236 U.S. 140 (1915).

We are well aware of IANNELLI v. UNITED STATES, 420 U.S. 770 (aff'g 477 F.2d 999), and UNITED STATES v. BECKER, 461 F.2d 230, rev'd. 417 U.S. 903 (1974).

We are not here arguing the so-called "Wharton's Rule". (2 Wharton, Criminal Law §1604 at 1862 [12th Ed., 1932]).

We are not arguing that because a substantive count was dismissed that a conspiracy could not be proved. We are arguing here the converse, that a substantive count which necessarily presupposes the existence of a conspiracy cannot be presented to a jury when the Trial Court has dismissed the conspiracy count.

As far as VARIANO is concerned, it is obvious that

the testimony of Mrs. David and the rather nebulous testimony of one agent (Douglas A. Wilhelmi) supposedly recognizing a voice on a recording, is hardly sufficient under the circumstances of this case.

It would appear that Mrs. David and the co-defendant Bucci may have combined with VARIANO in a particular enterprise, although we submit that even there there is very, very thin support for even that theory.

In no event, however, is there any explanation of how the jury could consider five or more persons to be engaged with VARIANO in any particular violation of Section 1955 of Title 18 of the United States Code.

In order to obtain a conviction on the conspiracy count, it would have been essential that the Government prove at least two things: (1) The existence of the conspiracy actually charged in the indictment, and (2) the participation of <u>each</u> defendant in that conspiracy. See, e.g., UNITED STATES v. STEINBERG, 525 F.2d 1126, 1133-34 [2 Cir., 1975), cert. den. 44 U.S.L.W. 3659 [May 19, 1976]. See also, UNITED STATES v. ARAUJO, decided 7/26/76, 2 Cir., Docket No. 76-1085, Slip Op. Pg. 5103.

In the case at bar, of course, there was no conspiracy

since the Trial Court as a matter of law dismissed it. But, in order to establish Section 1955 violations, the jury would still have to have found the essential ingredients of a single conspiracy.* Instead of the criterion "two or more," as would be required under the conspiracy statute, the requirement of "five or more" persons conjoining in conspiratorial conduct would have been necessary.

In other words, it is more difficult to prove a violation of Section 1955 than it is to prove a violation of a conspiracy count. It is, therefore, submitted that it was an a fortiori proposition that the substantive count had to be dismissed under the circumstances of this case once the conspiracy count was ruled insufficient.

POINT II

THE DEFENDANT-APPELLANT WAS PREJUDICED BY THE FACT THAT THE CO-CONSPIRATOR, FRANCIS J. MILLOW, REFUSED TO TESTIFY IN THE PRESENCE OF THE JURY. WE SUBMIT THAT THE GOVERNMENT SHOULD HAVE KNOWN THIS WAS GOING TO HAPPEN.

The defendant-appellant VARIANO and, for that matter all of the defendants on trial, were gravely prejudiced by the

*The dates of the conspiracy and of the §1955 violation are different, however.

dramatic situation which occurred when Francis J. Millow, a co-conspirator called by the prosecution, declined to testify at the trial. We submit that in the exercise of due diligence, the prosecution could have foretold the fact that this witness would refuse. Certainly the traumatic effect of such refusal upon the defense should have been avoided at all costs.

Since the refusal to testify occurred in the presence of the jury, it unquestionably gave the impression that the witness had been frightened into silence by the Appellant. It is inconceivable that this event could not have been anything but highly prejudicial to the defense. The fact that the prosecution called this witness is enough to charge them with the prejudice, irrespective of the fact that it may not have been intentional.* (Cf. BRADY v. MARYLAND, 373 U.S. 83).

As this brief is written, we have been unable to obtain the minutes of the official court reporter with respect to this incident, despite our inquiries of the Clerk's Office of this Court, the Official Court Reporter's Office, the file of the United States District Court, and Special Prosecutor Michael Abzug.**

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*We don't know if it was premeditated or not. The effect is the same in either event.

**Minutes following page 1474 are also missing without excuse.

We have had to interpolate what occurred from the small portion that is reflected in the record, and to some extent, upon the recollection of Patrick Broderick, Esq., trial counsel for VARIANO.

Mr. Abzug very fairly conceded, in a conversation with the writer of this brief, that the incident did occur in the presence of the jury.

In UNITED STATES v. MALONEY, 262 F.2d 535 at 537 (2 Cir., 1959), Judge Learned Hand condemned this practice, explaining:

> "If the prosecution knows when it puts the question that he will claim the privilege [against self-incrimination] it is charged with notice of the probable effect of his refusal upon the jury's mind."

See also, FLETCHER v. UNITED STATES, 332 F.2d 724 (1964, D.C. Cir.), and PEOPLE v. POLLOCK, 21 N.Y.2d 209.

POINT III

IT WAS IPSO FACTO PREJUDICIAL TO HAVE JOINED SO MANY DEFENDANTS INTO A SINGLE TRIAL, AND THE MORE SO BECAUSE MULTIPLE CONSPIRACIES RATHER THAN A SINGLE ONE WERE ADDUCED BEFORE THE JURY.

We maintain that a mass conspiracy trial at best is to be avoided. In the case at bar, however, since multiple

conspiracies were proved, rather than a single conspiracy, it is obvious that there should have been severances granted and that a fair trial was wholly impossible.

There were, of course, instructions by the Trial Court to the jurors, that they should consider matters only subject to connection and that certain evidence was admissible against some defendants, but not others, and so forth.

At the conclusion of the case, however, after the Judge dismissed the conspiracy count, there was no detailed instruction to the jury as to what the dismissal really meant. There was no effort made to marshall the evidence and to put in proper juxtaposition the evidence which was receivable for substantive purposes only in contrast to the substantial hearsay which was adduced involving the numerous co-conspirators and defendants.

Evidence was adduced against 30 co-conspirators and co-defendants and a great deal of hearsay was allowed.

> "The naive assumption that the prejudicial effects can be overcome by instructions to the jury, c.f., Blumenthal v. United States, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction." KRULEWITCH v. UNITED STATES, 336 U.S. 440, 453 (1949).

> ". . . the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." (L. Hand, J.) NASH v. UNITED STATES, 54 F.2d 1006, 1007 (CA 2, 1932).

In KRULEWITCH v. UNITED STATES, 336 U.S. 440, at 457, after a survey and criticism of the federal law of conspiracy, Justice Jackson declared:

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. . . . And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." (Emphasis added)

One of Justice Jackson's criticisms of the federal law of conspiracy was that it reduced the Sixth Amendment right to trial to a sham. Referring to HYDE v. UNITED STATES, 225 U.S. 347 (1912), he said (at 452-3):

> "Mr. Justice Holmes, on behalf of himself and Justices Hughes, Lurton and Lamar, wrote a vigorous protest which did not hesitate to brand the doctrine as oppressive and as 'one of the wrongs that our forefathers meant to prevent.'"

In KOTTEAKOS v. UNITED STATES, 328 U.S. 750, 773 (1946), where, as here, a single conspiracy was alleged, but multiple conspiracies were proved, that Court, reversing for this reason, stated that the proceedings of a mass trial "are exceptional to our tradition and call for the use of every safegyard to individualize each defendant in his relation to the mass," and continued:

> ". . . Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> "Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

In addition, we might point out that of some 50 exhibits that were introduced into evidence, there was none which specifically incriminated VARIANO and therefore could only have significance within the framework of the dismissed conspiracy count.

We must also bear in mind that there was no surveillance of any significance as against VARIANO since on only two occasions did the F.B.I. surveil VARIANO: one outside the Green Tavern, and on another occasion entering the Green Tavern.

Finally, the alleged voice identification of a person called "Pete" was hardly meaningful or probative of anything in connection with the Section 1955 count.

POINT IV

THE SUMMATION OF THE PROSECUTOR WAS PREJUDICIAL SINCE IT CLEARLY ALLUDED TO HEARSAY MATTERS WHICH WERE NOW BARRED BY THE RULING OF THE TRIAL JUDGE DISMISSING THE CONSPIRACY.

We commend to this Court a review of the prosecutor's summation, to which objections were taken, wherein it is obvious that he refers to hearsay matters which could only have significance in a conspiracy count. Since the conspiracy had been dismissed, it was obviously improper to have alluded to these items.

We do not dwell *in extenso* on this aspect since we submit that the foregoing allegations of error are more than sufficient to warrant reversal under any circumstances.

POINT V

ANOTHER EGREGIOUS ERROR WAS THE COURT'S ABUSE OF DISCRETION IN HOLDING THE VOICE IDENTIFICATION HEARING AS TO MR. VARIANO IN THE PRESENCE OF THE JURY, DURING WHICH THE PROSECUTOR INFERRED THAT THE VOICE WAS THAT OF MR. VARIANO, ALTHOUGH THE PROSECUTOR WAS NOT SWORN AS A WITNESS.

During the course of trial, when Agent Wilhelmi was testifying as to voice identification, certain recordings were played and, in the presence and hearing of the jury, Judge Carter inquired of the prosecutor as to whether that was the

voice of Mr. Variano, and the prosecutor replied with a virtual assurance that Wilhelmi would so confirm (1154-1167).

It was highly improper to have permitted this "identification" by the Government attorney when it was for the jury to determine whose voice it really was. This obviously pitted the credibility of Mr. Abzug against that of the defense. It also had a chilling effect upon Mr. Variano taking the witness stand, which he ultimately abjured.

This was highly prejudicial since there was very little evidence against VARIANO to begin with.

POINT VI

THE ELECTRONIC SURVEILLANCE TAPES WERE NOT PROMPTLY SEALED AND THERE WAS NO PROPER MINIMIZATION IN ACCORDANCE WITH THE REQUIREMENTS OF 18 U.S.C. 2510-2520.

We ask the Court to note that the issue of minimization, that is the lack of it, and a delay in sealing the tapes of electronic surveillance, were properly raised before the Court below.

Again, we recognize that these points may be surplusage in view of the fact that we believe the prior argument herein, especially that dealing with the dismissal of the

conspiracy count and the failure to dismiss the substantive count, may make it unnecessary for the Court to even reach this aspect. (See: UNITED STATES v. PRINCIPIE, 2 Cir., 1976, Docket No. 75-1175).

Be that as it may, however, we submit that under the ruling of UNITED STATES v. GIGANTE, ___F.2d___, 2 Cir. 1976, Docket No. 76-1128, a failure to properly adhere to the strict requirements of the statute referred to above, namely 18 U.S.C. 2510-2520, requires the suppression of such evidence. See also, PEOPLE v. SHER, 38 N.Y.2d 600, and PEOPLE v. NICOLETTI, 35 N.Y. 2d 249.

We note that this Court specifically distinguished the Third Circuit opinion in UNITED STATES v. FALCONE, 505 F.2d 478, cert. den. 420 U.S. 955, when it decided the GIGANTE case, supra. See dissent in UNITED STATES v. GIORDANO, 416 U.S. 505, and UNITED STATES v. CHAVEZ, 416 U.S. 562.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed, or in the alternative, a new trial granted.

We also adopt the points raised by co-appellants in this case so far as relevant to appellant VARIANO.

Respectfully submitted,

IRVING ANOLIK
Attorney for Defendant-Appellant
PETER VARIANO

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th Rd MASPETH, N.Y.

That on the 27 day of SEPTEMBER, 1976, deponent personally served the within DEFENDANT-APPELLANT VARIANO'S BRIEF upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are thos that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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Robert La Grassa

Sworn to before me this
21 day of September, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

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